STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2016-001367

THE STATE,

Respondent,

v.

CALVIN SOLOMON BARR,

Appellant.

INITIAL BRIEF OF RESPONDENT

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Did the trial judge properly refuse to grant a directed verdict when the State produced substantial circumstantial evidence that Appellant was in constructive possession of drugs found in his home, where evidence showed items used for the distribution of drugs were found in the same room Appellant was arrested in, and drugs were found in Appellant's laundry room?

II.

Did the trial judge properly instruct the jury on the definitions of "dominion" and "control" when the jury asked for clarification of the terms, and when the instruction, read as a whole, adequately covered the correct law and did not relieve the State of their burden of proof or shift the burden to Appellant?

STATEMENT OF THE CASE

In September 2015, the Horry County Grand Jury indicted Appellant for one count of possession with intent to distribute heroin, one count of possession with intent to distribute marijuana, and one count of possession of cocaine. On April 19-21, 2016, a jury trial was held in the Horry County Court of General Sessions with the Honorable Larry B. Hyman, presiding. Appellant was represented by Stuart Axelrod, Esquire, and Jeffrey Lucas, Esquire, of Axelrod and Associates P.A. The Respondent (the State) was represented by Assistant Solicitors David Caraker, and Gray Ervin of the Fifteenth Circuit Solicitor's Office. During jury deliberations, Appellant absconded from the courthouse and did not return for the jury verdict. At the conclusion of trial, the jury convicted Appellant of all three counts. Following the verdict, the trial judge sentenced Appellant in his absence and placed the sentence under seal. A bench warrant was issued for Appellant. In the months following the trial, Appellant was arrested on the bench warrant and appeared in court for the unsealing of his sentence on June 13, 2016. The trial judge sentenced Appellant to a term of fifteen years' imprisonment for a second offense on possession with intent to distribute heroin, as well as two additional concurrent terms of five years' imprisonment each for possession with intent to distribute marijuana, first offense, and possession of cocaine, second offense. Appellant was sentenced to an aggregate term of fifteen years' imprisonment. Appellant then timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On August 9, 2014, Officer Dwight Tomlin of the Myrtle Beach Police Department responded to 206 Maple Street in Myrtle Beach in reference to a complaint of possible narcotics activity at the house. (Tr. 46, 270). When Tomlin arrived, the complainant, Nicole Barr, was not present. (Tr. 108, 271). Barr is Appellant's wife. (Tr. 241). Tomlin called Barr and asked her to return to the residence. (Tr. 109, 271). Barr returned to the residence and let police officers inside. (Tr. 271). Once inside, Tomlin located Appellant lying in a bed in the master bedroom and placed him under arrest for an outstanding warrant alleging domestic violence[1]. (Tr. 109, 112-13, 253). Appellant was the only occupant of the house. (Tr. 112-13, 271). After Appellant was placed under arrest, Tomlin saw a set of scales, small black plastic baggies with gold skulls, approximately two thousand dollars in cash, and a razor blade in plain view in an open dresser drawer. (Tr. 113, 138-39, 149). Tomlin also located a video surveillance system. (Tr. 115). Based on Tomlin's training and experience, he suspected there may be drug activity occurring in the home. (Tr. 114). Tomlin then called Officer Stephen Thackray and asked him to obtain a search warrant (Tr. 120-21).

Thackray obtained a search warrant from a magistrate and began to search the house. In the laundry room, he located a lockbox with suspected narcotics inside. (Tr. 143). Inside the lockbox were twenty five packets which later tested positive for heroin, razor blades, scissors, tin foil, a spoon, and the same black plastic baggies with gold skulls that were found in the bedroom with Appellant. (Tr. 143-44, 146). Also located in the lockbox was a business card from Go Fast Rentals where Appellant had bought a moped the prior month. (Tr. 144). Anita Stanley of Go Fast Rentals testified that Appellant had provided a driver's license during the transaction that

[1] Stephen Thackray testified the home only had two bedrooms, and the other bedroom had bunk beds and kids clothing. (Tr. 164-65).

listed 206 Maple Street as his address. (Tr. 132). Thackray also located a microwave in the laundry room with white residue inside which field tested positive for cocaine. (Tr. 143, 145). Thackray testified the microwave appeared to be used in the manufacture of crack cocaine. (Tr. 143). Thackray also located a container of dry, uncooked rice, which he testified was typically used in transporting heroin to keep it from getting "cakey" by absorbing moisture. (Tr. 145). Thackray also found marijuana and cocaine. (Tr. 156). Finally, Thackray testified the items found in Appellants house were consistent with a drug dealer rather than a drug user. (Tr. 145-46).

The State also presented testimony from two expert witnesses regarding the analysis of the suspected narcotics found during the search warrant. Jason Shumpert of the Myrtle Beach Police Department testified that the sample he analyzed tested positive for 6.93 ounces of Marijuana. (Tr. 186). Lawrence Zivkovich from the State Law Enforcement Division testified to analyzing two samples seized from Appellant's house. One sample tested positive for .42 grams of cocaine, and the second sample tested positive for .22 grams of heroin. (Tr. 199). The State completed their case by entering a copy of Appellant's bond paper work which listed 206 Maple Street as Appellant's address. (Tr. 207). Following the close of State's evidence, Appellant moved for a directed verdict. Appellant argued that the State did not produce sufficient evidence to show Appellant had dominion and control over the drugs. (Tr. 211). The trial judge denied Appellant's motion, finding: "there is sufficient evidence on which the jury could reasonably infer that the defendant was in constructive possession of these drugs." (Tr. 217, lines 14-16).

Appellant then presented a case to the jury, and the State provided rebuttal testimony. During Appellant's case, Barr was called as a witness. Barr testified that Appellant would stay at the house "off and on", and that two other people had lived there in the past "off and on." (Tr.

242). One resident, Basheba Worrell, was a "dancer, entertainer" who stayed there "about two months off and on." (Tr. 242, lines 23-25). The other resident was a man named Mike Rogers, who Barr testified "is now deceased." (Tr. 251, line 2). However, Barr did not specify when either individual lived in the house, and neither individual testified on behalf of Appellant. At the end of Appellant's case and State's rebuttal, Appellant again moved for a directed verdict. (Tr. 267, 296). The trial judge denied Appellant's motion. (Tr. 267, 297). The jury found Appellant guilty on all three counts. Appellant then filed his appeal.

ARGUMENT

Appellant contends the trial judge erred in refusing to direct a verdict of acquittal, because the State allegedly failed to produce substantial circumstantial evidence of Appellant's constructive possession of drugs found in his home. However, the State produced evidence Appellant lived in the home and that Appellant was the only person present in the home when drugs were found by law enforcement. Furthermore, the State presented evidence that scales, razor blades, two thousand dollars in cash, and black plastic baggies, all items typically used in distributing drugs, were found in Appellant's bedroom. (Tr. 113, 138-39, 149). When considered in the light most favorable to the State, the evidence presented by the State amounts to substantial circumstantial evidence to warrant consideration by a jury. Appellant also contends the trial judge erred in instructing the jury on the definitions of "dominion" and "control." Appellant contends that in doing so, the trial judge lowered the burden necessary for the jury to find Appellant guilty. The trial judge properly provided additional clarification, because the definitions of "dominion" and "control" adequately covered the correct law and did not shift the burden of proof to Appellant or lower the burden of proof for the State.

I.

The trial judge properly refused to direct a verdict for Appellant when the State produced substantial circumstantial evidence that Appellant was in constructive possession of drugs that were found in his home, when Appellant was the only occupant of the house, and items used for the distribution of drugs were found in Appellant's bedroom.

Appellant contends the trial judge erred in failing to grant a directed verdict for Appellant. Specifically, Appellant contends the State did not produce substantial circumstantial evidence that Appellant was in constructive possession of drugs. However, substantial circumstantial evidence of Appellant's constructive possession was presented at trial to justify the denial of Appellant's directed verdict motion and submission of the case to the jury.

In determining whether a directed verdict should be granted, a trial judge shall consider "only the existence or non-existence of the evidence and not its weight." Rule 19 SCRCrimP, State v. Bennett, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016). When reviewing a denial of a directed verdict at the trial level, the appellate court must view the evidence in the light most favorable to the State. State v. Rowell, 326 S.C. 313, 487 S.E.2d 185 (1997). If there is any direct evidence or ***any*** substantial circumstantial evidence tending to prove the guilt of the accused, then the case was properly submitted to the jury. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (emphasis added). When the State relies on circumstantial evidence, "the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Bennett 415 S.C. at 237, 781 S.E.2d at 354. If the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced, the case must go to the jury. State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

Appellant primarily relies on State v. Heath, 370 S.C. 326, 635 S.E.2d 18 (2006), to argue the trial judge erred in denying his motion for directed verdict. However, the current case before this Court differs substantially from Heath. In Heath, the house at issue was owned by Heath's mother. Id. at 328, 635 S.E.2d at 18. When police arrived at the house, Heath was outside in front of the house with his brother. Id. Inside the home, police discovered crack cocaine, scales, plastic baggies, and approximately two thousand five hundred dollars in cash. Id. at 328, 635 S.E.2d at 19. Most significantly, police also discovered 43.48 grams of crack cocaine in a car washing mitt in a recycling bin outside near the back door of the house. Id. at 329, 635 S.E.2d at 19. The Supreme Court ruled: "it is arguable that Appellant merely had a right to

access the area where the crack was found, not actual dominion and control over the property." Id. at 330, 635 S.E.2d at 19.

The facts in the current case differ substantially from Heath. Here, law enforcement responded to a complaint by Appellant's wife that he was selling drugs out of the home. (Tr. 108). The drugs were found in Appellant's home when Appellant was the only occupant in the home. (Tr. 112-13, 271). Black plastic baggies with gold skulls, scales, razor blades, and nearly two thousand dollars in cash were found in Appellant's bedroom next to the bed where Appellant was lying. (Tr. 113, 138). Each of these facts contrasts with the facts presented in Heath. In Heath, the majority of the drugs were found in a recycling bin outside the home. Id. at 329, 635 S.E.2d at 19. Heath was not inside the home when law enforcement arrived, nor was he the only person present at the residence. Id. at 328, 635 S.E.2d at 18. Crack cocaine along with items associated with the distribution of drugs were found inside the residence, but not with any immediate connection to Heath. Id. at 328, 635 S.E.2d at 19. There was arguably a greater connection between the drugs and Heath's brother, who ran inside the house and locked himself in a bathroom when police arrived. The facts of the current case therefore, are entirely different from Heath.

The facts presented in this case are more analogous to those presented in State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). In Muhammed, this Court concluded that Muhammed's directed verdict motion was properly denied, because the State produced sufficient evidence to establish that Muhammed had constructive possession of cocaine. Id. at 27, 524 S.E.2d at 639-40. The State presented evidence from an informant that Muhammed and a co-defendant had approached him about a drug deal. Id. The informant gave police information about the car Muhammed was driving and the house where he was staying. Police searched

Muhammed's bedroom and his car. Police found a razor blade, cash, telephone equipment, and pagers inside Muhammed's car. Id. at 28, 524 S.E.2d at 640. Law enforcement also located 19.7 grams of crack cocaine in a shoe box within Muhammed and co-defendant's bedroom. Id. at 25, 524 S.E.2d at 638. The owner of the house testified that Muhammed and his co-defendant had been visiting for two days prior to the incident, had placed a lock on the bedroom door for which Muhammed had a key, and one of them had carried a shoe box into the bedroom. Id. at 28, 524 S.E.2d at 640.

The evidence presented here to establish constructive possession is greater than the evidence presented by the State in Muhammed. Like in Muhammed, this case began with a complaint of drug dealing. The complaint in Muhammed brought police to a location, where Muhammed had been visiting for a couple of days. Id. However, the complaint here brought police to a location where Appellant had been living long enough to have the address listed on his driver's license and on his bond paperwork. In Muhammed, police found items associated with drug dealing in Muhammed's car. Id. Here, police found similar items in Appellant's bedroom adjacent to where Appellant was sleeping. In Muhammed, Muhammed was one of two people present at the residence when law enforcement arrived. Id. at 25, 524 S.E.2d at 638. Here, Appellant was the only person in the residence when police arrived. (Tr. 112-13, 271). When comparing the two cases, it is clear the State presented a greater amount of evidence of constructive possession in this case than in a case this Court previously ruled was sufficient to send to a jury.

When viewed in the light most favorable to the State, the State produced enough evidence at trial to prove Appellant had more than mere access to the area where drugs were found. The State showed that Appellant lived at the residence by presenting a copy of

Appellant's bond paperwork listing Appellant's address as 206 Maple Street. (Tr. 207). The State also presented testimony that 206 Maple Street was the address on Appellant's driver's license. (Tr. 132). Moreover, Appellant was the only individual inside the house when law enforcement arrived. (Tr. 112-13, 271). Not only was Appellant the only person in his home when drugs were found, Appellant was sleeping immediately adjacent to an open dresser where items associated with drug distribution were found. (Tr. 113, 138-39). Certainly Appellant's close proximity to drug distribution material, the complaint of drug distribution made against Appellant by his wife, and Appellant being the only occupant of the house is enough evidence from which Appellant's guilt could be fairly and logically deduced by a reasonable juror. When viewing the evidence in the light most favorable to the State, the State produced substantial circumstantial evidence of Appellant's guilt. Thus, it was proper for the trial judge to submit this case to the jury. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly instructed the jury on the definitions of "dominion" and "control", because the jury asked for clarification of these terms, and because, when read as a whole, the instruction adequately covered the correct law and did not relieve the State of their burden of proof or shift the burden to Appellant.

Appellant contends the trial judge erred in instructing the jury on the definitions of "dominion" and "control", because the definitions lowered the burden necessary for the jury to find Appellant guilty. In analyzing Appellant's claim, it is instructive to review the jury instruction given by the trial judge and to identify the specific portion Appellant takes issue with. The trial judge told the jury:

> Constructive possession means that the Defendant had dominion and control or the right to exercise dominion and control over either the heroin itself or the property on which the heroin was found. Mere presence at the scene where the drugs were found is not enough to prove possession. The Defendant's knowledge

and possession may be inferred when a substance is found on the property under Defendant's control.

(Tr. 329, lines 14-22)[2]. Appellant concedes that this initial instruction given by the trial judge was appropriate. The only exception Appellant takes to this instruction is the trial judge's subsequent clarification of the meaning of the words "dominion" and "control". After being asked by the jury for clarification on these terms, the trial judge provided the following definition: "**The word dominion as used in my charge means the power, authority, or right to use or dispose of property or a thing. Control means to have power over a thing.**" (Tr. 341, lines 15-18). By providing the jury these definitions, Appellant contends the trial judge somehow reduced the State's burden to only require the State to prove Appellant had mere access to the property, thereby contradicting our Supreme Court's ruling in Heath[3].

The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578 (2010) (*quoting* State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003)) A jury charge that is substantially correct and covers the law does not require reversal. Mattison at 478, 697 S.E.2d at 583. "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

[2] Immediately prior to this instruction, the trial judge instructed the jury: "to prove possession, the State must prove beyond a reasonable doubt that the Defendant had both the power and the intent to control the disposition or use of the heroin." (Tr. 329, lines 7-10)

[3] Heath does not address any issues relating to jury instructions. The only issue addressed in Heath was whether a directed verdict should have been granted by the trial judge.

Here, the jury charge given by the trial judge was proper, because it adequately covered the law, it did not shift the burden of proof to Appellant, nor did it lower the burden of proof for the State. At the heart of Appellant's complaint is the assertion that a jury instruction requiring Appellant to have "the power, authority, or right to use or dispose of property" is somehow equivalent to Appellant merely having access to a property. The words "power", "authority", and "right to use or dispose" clearly imply a greater degree of control over an item than just mere access. These words state plainly that Appellant had to be able to do something with the drugs, not just have access to where they were. The trial judge never used the words "access" or "mere access." However, the trial judge did explain that mere presence was not sufficient. "Mere presence" is certainly more analogous to "mere access" than having "power" or "authority" over something, and the trial judge clearly stated that mere presence was not enough. These definitions do not lower the burden of the State or mislead the jury. When taken as a whole, the trial judge's jury instruction clearly required the State to prove that Appellant had a greater control over the drugs than just mere access.

Even assuming, for the sake of argument, that the trial judge's instructions did not adequately cover the law or were misleading in some way, the instruction did not shift the burden of proof to Appellant or away from the State. The trial judge clearly instructed the jury regarding the State's burden:

> Now, the Defendant has plead not guilty to these indictments, and that puts the burden on the State to prove the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it is an important rule of the law that the Defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which the indictment was issued unless guilt has been proved by evidence satisfying you of that guilt beyond a reasonable doubt.

(Tr. 323-24, lines 23-9). Nothing in the trial judge's instruction or in the State's closing argument shifted this burden to Appellant or required anything less of the State.

Improper burden shifting has previously been found in cases where the trial judge made an erroneous instruction to the jury that implied a defendant must prove something. In State v. Attardo, 263 S.C. 546, 211 S.E.2d 868 (1975), our Supreme Court found that a trial judge improperly shifted the burden to a defendant when the court instructed the jury: "But, normally where a person is in possession of contraband, there is a factual presumption that he knows what it is, and the burden is then on him to prove that he did not have actual knowledge." Id. at 549, 211 S.E.2d at 869. Additionally, our Supreme Court has cautioned trial courts against using any kind of language in a jury charge which creates a mandatory presumption of guilt against defendants. See Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008).

In Appellant's case, the trial judge's clarification on the meaning of two words did not shift the burden of proof to Appellant or decrease the burden on the State. The trial judge never deviated from his initial remarks on the burden of proof, and he never said the State had anything less to prove. Because the instructions of the trial court adequately covered the law and were not misleading, Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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January 4, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
The Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2016-001367

THE STATE,

Respondent,

v.

CALVIN SOLOMON BARR,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certify that all parties required by Rule to be served have been served.
This fourth day of January, 2018.

Sally Ellison

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January 4, 2018

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RE: State v. Calvin Solomon Barr
Appellate Case No. 2016-001367

Dear Ms. Caudy:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Scott Matthews

J. Scott Matthews
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JSM/ab
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services